UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 4 1999

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

FROM: Nancy Stoner, Director
Office of Planning and Policy Analysis

TO: Regional Counsels, Regions I, IV, V, VI, VIII, IX and X

SUBJECT: Model State Letter Concerning Title V Programs in Audit Law States

The purpose of this memorandum is to transmit a model letter for Regions to send to states that have enacted problematic audit laws which also have interim Title V approval under the Clean Air Act. The attached letter, which will also be sent to you electronically, lays out a flexible approach designed to spur states to fix problematic audit laws, while at the same time giving them a reasonable amount of time to do so.

As you know, privilege and immunity laws can undermine the enforcement authorities that states are required to have under 40 C.F.R. Part 70 as a condition of running Title V programs *(see Statement of Principle: Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Programs,* February 14, 1997). While some states have used a mix of statutory amendments and legal interpretations to address the barriers to EPA approval of federal programs created by their audit laws, and several others are in the midst of discussions with EPA designed to do the same, many others have taken no action.

The affected states fall into two basic categories: (1) those given interim approval with no requirement that the audit law be addressed as a condition of full approval; (2) those that enacted audit laws subsequent to the granting of program approval. We estimate that a total of ten states fall into these categories. Category one states -- excluding Texas and Virginia, which have already satisfactorily addressed their audit law problems -- include Colorado, Minnesota, Arkansas, Kentucky, Indiana and Illinois.[1] Category two states -- excluding

[1] New Hampshire is somewhat unique, in that it enacted an audit law prior to the granting of interim Title V approval, but also gave EPA an attorney general's opinion before interim approval was granted that rendered the state's audit law inapplicable to the Title V program.

Michigan and Wyoming, which have already satisfactorily addressed their audit law problems -- include Montana, Rhode Island, Nevada, and Alaska. Regions should consult with OPPA to discuss whether this model letter should be sent to the states within that Region based on the progress of audit law discussions with the state.

In evaluating attorney general opinions received by EPA pursuant to the request letter described above, the Regions will be asked to consult closely with the Office of Planning and Policy Analysis (OPPA), which will coordinate review within OECA and with OAQPS. The contact person for OPPA is Bob Fentress, who can be reached at (202) 564-7023.

If you have questions about this memorandum or the attached model letter, please call me at (202) 564-6577.

Attachment

cc: John S. Seitz
James C. Nelson
A1an W. Eckert
Bruce C. Buckheit
Regional Air Division Directors
Audit Task Force
Regional Counsels, Regions II, III and VII

RE: [State's] Audit Law and Clean Air Act Title V Program Full Approval

Dear [State Official]:

As you may know, the U.S. Environmental Protection Agency (EPA) believes that state laws which create a privilege for evidence of violations and/or penalty immunity for violations discovered during environmental self-evaluations can undermine the enforcement authorities which states must possess as a condition of being approved or authorized to run federal programs. In April of 1996, U.S. EPA identified, in a memorandum to EPA Region X, the minimum enforcement authorities that states with audit privilege or immunity laws must retain in order to receive Agency approval to run the Clean Air Act Title V program.[1] In February of 1997, EPA identified the minimum enforcement authorities which such states with audit laws must retain in order to be approved or authorized to run federal programs under four statutes: the Clean Water Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the **Clean** Air Act.[2]

[State] enacted an audit [privilege and/or immunity] law in [date] and received interim approval of its Title V program under the Clean Air Act from EPA in [date]. We are writing to you now, in advance of the [date] deadline for a decision regarding Clean Air Act Title V full approval, because EPA's preliminary analysis indicates that [state's] audit law appears to interfere with the enforcement authorities required as a condition of full Title V approval.

By this letter, therefore, the Agency is requesting that [State] provide U.S. EPA, pursuant

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[1] "Effect of Audit Immunity/Privilege Laws on States' Ability to Enforce Title V Requirements," memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Mary Nichols, Assistant Administrator for Air and Radiation, to Jackson Fox, Regional Counsel, Region X (April 5, 1996).

[2] "Statement of Principles: Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Programs," memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, Robert Perciasepe, Assistant Administrator for Water, Mary Nichols, Assistant Administrator for **Air** and Radiation, and Timothy Fields, Acting Assistant Administrator for Solid Waste and Emergency 'Response, to Regional Administrators (February 14, 1997).

to 40 C.F.R. § 70.4(i)(3),[3] with a legal opinion from the State's Attorney General addressing the effect of the State's audit law on the enforcement authorities necessary as a condition of Title V approval, including whether the laws of the State provide adequate authority to carry out ail aspects of the Title V program. EPA asks that this opinion be submitted to the Region within four months of the date of this letter. I have enclosed a copy of a July, 1996 opinion provided to EPA by the Attorney General of the State of New Hampshire in which the Attorney General opines that the State's audit privilege and immunity law is inapplicable to the Title V program. If the reasoning of the New Hampshire Attorney General's opinion applies to [state's] audit law as well -- or if the state can articulate an equally persuasive basis or rationale, consistent with federal laws and regulations governing approval of state programs, for concluding that the law does not apply to violations of Title. V -- the law will not represent an impediment to granting full federal approval for the State's Title V program. EPA encourages [state] to address this potential problem in advance of the Title V full approval submission deadline so that there will be no interruption in the State's administration of the Title V program.

EPA is hopeful that the apparent conflict between [state's] audit law and its required Title V authorities under the Clean Air Act can be satisfactorily addressed by issuance of the requested Attorney General's opinion and/or modifications to the audit law. If, however, the State is unable to provide a legal interpretation which accomplishes that purpose, EPA will consider exercising its options under 40 C.F.R. Part 70 for addressing Title V program deficiencies. Those options include making a formal determination that the state's enforcement authorities are inadequate and seeking modifications to the state audit law through 40 C.F.R. § 70.4(i), and/or initiating proceedings under 40 C.F.R. § 70.10 to consider withdrawal of the state's Title V program.

We will be happy to speak with you about these issues in more detail. If you have any questions, please call [contact] at [phone number].

Sincerely,

[Regional Administrator or Regional Counsel]

Enclosure

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[3] That provision states that "[w]henever the Administrator has reason to believe that circumstances have changed with respect to a State [Title V] program, he may request, and the State shall provide, a supplemental Attorney General's statement, program description, or such other documents or information as he determines are necessary."